must be made in the form of a summons as prescribed in the old edition of *Atkin's* Court Forms and Precedents, Volume 5, at page 272. He further states that the present procedure is probably based on the old Civil Procedure Code, and therefore should not be adopted.

Order 38 rule 1 provides:

"Upon any motion, petition, or summons evidence may be given by affidavit, but the court or a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence unless by the special leave of the court or a judge."

In this case, it is not in dispute that our Order 38 contains only twenty-four rules, whereas the equivalent English provision has rules 25 to 31. It is also not in dispute that those rules which do not appear in our Order 38 deal with trial by affidavit. Having read the *Atkin's* Court Forms at page 272, I am of the view that the summons for leave to cross-examine on affidavits and for an order to produce a deponent which learned counsel for the second defendant has suggested for adoption, only applies to trial by affidavits; and, as such, I do not think such procedure should be adopted in the present case. Having regard to the provision of Order 38 rule 1, I am of the view that the order for the attendance of a deponent for cross-examination can be granted by the court on oral application of any party to the proceedings after Notice of Intention to cross-examine deponent has been served. Although based on the requirement of sections 534 to 540 of the repealed Civil Procedure Code 1907, the present procedure adopted in the High Court is both sound and convenient in the absence of any specific provision. The notice will serve to forewarn a deponent that he is required to attend court, and this procedure will avoid a party from being taken by surprise if no notice at all was given. As stated in the foot-note of *Atkin's* Court Forms and Precedents at page 272:

"Cross-examination on affidavit may take place (a) before trial, or (b) at the hearing of a trial on which evidence is taken on affidavit by consent, or (c) after trial. In case (a) the court's jurisdiction is regulated by Order 38, r.1, but by Order 37, r.22, the practice on cross-examination at a trial is extended to the case *(Mansel* v. *Clanricarde, infra)*; case (b) is regulated by Order 38, rr.28, 29, and the above form is not intended for use in such a case; in case (c) the court's jurisdiction is regulated by Order 38, r.1, but by Order 37, r.21, evidence is to be taken in the same manner as evidence taken at or with a view to trial, and the above form may be used in such a case."

In my judgment, the present proceedings do not come under case (a), (b) or (c). I do not agree with the submission that the present case comes under (b). Even if it does, from the foot-note commentary as quoted above, the summons as prescribed in Form 137 of *Atkin* is not intended for use in such case. In the circumstances, I hold that the present procedure of serving notice of intention to cross-examine deponent and making oral application is sufficient compliance with Order 38 rule 1 of the Rules of the Supreme Court where cross-examination of a deponent is required at the hearing of a trial of the present nature.

Order accordingly.

Solicitors: *Rithauddeen & Aziz; Chin, Sethu & Co.; Wong & Cheng Kiat; Mah-Kok & Din.*

YAP CHENG KEE & ANOR. v. OW GIAM ENG & ANOR.

[A.C.J. (Wan Suleiman F.J.) May 19, 1975]
[Seremban — Civil Appeal No. 6 of 1971]

Landlord and Tenant — Statutory tenant — Death of statutory tenant — Whether family of statutory tenant entitled to remain on the premises — Control of Rent Ordinance, 1956, ss. 2(1) and 12(1)(i).

The respondent's predecessor in title had instituted ejectment proceedings against the tenant of the premises. The application had been dismissed and it was claimed that the tenant became a statutory tenant. The tenant subsequently died and the respondents thereupon served a notice to quit on the appellants, the administrators of the estate of the deceased tenant, and brought an action for recovery of possession. The learned magistrate gave judgment for the respondents. The appellants appealed. On August 20, 1974 Wan Suleiman F.J. delivered judgment dismissing the appeal (see [1975] 1 M.L.J. 151). Subsequently the learned judge revised his judgment.

Held, allowing the appeal: section 2(1) of the Control of Rent Ordinance, 1956, has extended the meaning of "tenant" thus enlarging the scope of the protection of the Ordinance and the family of the deceased statutory tenant was therefore protected by the Ordinance.

Cases referred to:-

(1) *Ayyar* v. *Parameswara Iyer* [1953] M.L.J. 102, 103.
(2) *Che Esah & Anor.* v. *Che Limah* [1966] 1 M.L.J. 36.
(3) *State of Perak* v. *P.R.A.L.M.M. Muthukaruppan Chettiar* [1938] M.L.J. 247, 256.
(4) *Tan Khio Soei & Anor.* v. *Ban Hin Lee Bank Ltd.* [1964] M.L.J. 71.
(5) *Ramasamy Pillai* v. *Meyappa Chettiar* [1955] M.L.J. 105, 106.
(6) *Keeves* v. *Dean* [1924] 1 K.B. 685.
(7) *Thong Seong Poh & Anor.* v. *Thong Meng Tee* [1967] 1 M.L.J. 23; [1967] 2 M.L.J. 153.

CIVIL APPEAL.

Khaw Yew Mei (Miss) for the appellants.

Atma Singh Gill for the respondents.

Wan Suleiman F.J.: The respondents in this appeal, the plaintiffs in the court below, are the registered proprietors of premises No. 11, Main Road, Bahau, and the appellants, who were the defendants in that action, are the administrator of the Estate of Yap Boot alias Yap Eng Kee (hereinafter to be referred to as the deceased), in which capacity they were sued.

The respondents' predecessor in title had let the premises to the deceased on certain financial terms not material for the purposes of this appeal.

On November 29, 1947 respondents' predecessor in title instituted ejectment proceedings against the deceased (see Exhibit "A") and on December 19, 1947 the application was dismissed. The respondents therefore claim that deceased thereby became a statutory tenant.

Deceased died intestate on July 22, 1966 and appellants extracted Grant of Letters of Administration on July 3, 1967.

Respondents then served upon the appellants a notice to quit dated February 2, 1968 purporting to terminate the tenancy on March 31, 1968, and prayed *inter alia* for vacant possession of the premises.

The statement of defence was not as precise as it should be, but at the trial counsel for both parties elected not to call witnesses but to make submissions of law on the pleadings.

Because of the lack of precision in the pleadings, particularly in the statement of defence, and because of

the absence of any agreed statement of facts in the Appeal Records, I had to rely only on what the learned magistrate referred to as submission by counsel for the respondents/plaintiffs and reply by counsel for the appellants.

From what the two said, neither disputing the statements of facts made by the other, the following facts appear to be not in controversy.

The premises were controlled premises, both appellants/defendants were children of the deceased tenant; the deceased left no widow (presumably she had predeceased him); that both defendants had been residing and continued to reside on the premises after his death.

On the basis of these facts what remained for the learned magistrate to decide was whether in law, the respondent landlords were entitled to recover possession from children of a statutory tenant who had remained in possession of the premises after his death, and he held that a statutory tenant had only a personal right so that on his death the tenancy did not pass to anyone.

In the event he gave judgment for the plaintiffs/respondents.

The first ground of appeal was that the notice to quit *i.e.* the one dated February 2, 1968 was unnecessary, if the statutory tenancy had been determined by the tenant's death. Learned counsel for the appellant seems to me to have raised a valid point. Such a notice would indeed be superfluous if the plaintiffs/respondents' main contention is determined in their favour.

The next ground of appeal was that erroneous admission by counsel on the law does not bind the parties. It should be noted that Mr. Choong Tah who represented the appellants/defendants before the magistrate was replaced by Miss Khaw of the same firm at the appeal. My attention was drawn to the decision in *Ayyar* v. *Parameswara Iyer*,[1] *Che Esah & Anor.* v. *Che Limah*,[2] and the *State of Perak* v. *P.R.A.L.M.M. Muthukaruppan Chettiar*.[3] It was further urged upon me that the deceased was a contractual tenant.

However this is clearly not a case of erroneous admission on law but a question of fact which could readily have been proved at the hearing had not the then counsel for the defendants/respondents conceded this fact. Accordingly in exercise of the discretion given to me to receive further evidence, by section 29 of the Court of Judicature Act read with section 69 thereof, I allowed Mr. Atma Singh to put in a certified copy of the judgment of the Rent Board Kuala Pilah dated December 19, 1947 (Exhibit "A"). The outcome of the failure of that ejectment proceedings was that the deceased became in effect a statutory tenant, though this term was not so called in the Rent and Charged Land (Restriction) Enactment, 1940, the law prevailing at that time.

Before going on any further, there is a point of law which has to be settled. The deceased died on July 22, 1966 and the Control of Rent Act 1966 did not come into force until January 1, 1967. Therefore I would agree with Mr. Atma Singh when he said that the 1956 Ordinance and not the 1966 Act governs the right of the parties.

We now come to the main issue i.e. whether the family of a deceased statutory tenant who remains in possession of the premises after his death is protected by the 1956 Ordinance.

The following passage from his judgment will show what had confused the learned President:

"Up to this stage the law seems to be clear. But from the Rents Acts by Megarry at page 182, the learned author said under the heading: *2. Status not property*

'It has been said time and time again that the statutory tenant has no estate or property as tenant at all, but has a purely personal right to retain possession of the property.'

This view was confirmed by a Federal Court decision in a case of *Tan Khio Soei & Anor.* v. *Ban Hin Lee Bank Ltd.* [1964] M.L.J. 71.

The Lord President in the course of his judgment at page 73 said:

'In the circumstances no rights of any sort in respect of the premises occupied by Sheikh Abdul Kader passed to the Chief Justice or to his family or to his personal representative or to anybody else and those who were in physical occupation of the premises after his death were trespassers.'

A statutory tenant confers no tenancy if he purports to sub-let it. For the proposition of this law there is a judgment of Ismail Khan J. in the case of: *Thong Seong Poh & Anor.* v. *Thong Meng Tee* [1967] 1 M.L.J. 23.

At page 25 his Lordship said:

'The first appellant had forfeited his right to continue his statutory tenant by giving up his business premises to his son.'

This case went up to the Federal Court in the case of: *Thong Seong Poh & Anor.* v. *Thong Meng Tee* [1967] 2 M.L.J. 153.

It confirmed the judgment of Ismail Khan J."

In *Tan Khio Soei's*[4] case, a Singapore case under the Control of Rent Ordinance (Cap. 242), Thomson L.P. delivering judgment, said "In the case of *Ramasamy Pillai* v. *Meyappa Chettiar*,[5] *supra*, I expressed the view that for reasons which I do not propose to repeat here there is no difference between a statutory tenant under our legislation and a statutory tenant under the English Rent Acts, and I have listened to nothing in the present case which creates any doubt in my mind as to the correctness of that view. The position of such a person in England was thus described by Bankes L.J. in the case of *Keeves* v. *Dean*[6] as follows: —

"His right is a purely personal one, and as such, unless the statute expressly authorizes him to pass it on to another person, must cease the moment he parts with the possession or dies."

His Lordship therefore came to the conclusion that no rights of any sort in respect of the premises occupied by Shaik Abdul Kader (the deceased statutory tenant) passed to the Chief Justice or to his family or to his personal representative or to anybody else and those who were in physical occupation of the premises after his death were trespassers.

Ramasamy Pillai's case was one decided under the provisions of the Federal Control of Rent Ordinance No. 6 of 1948.

In both these Ordinances, the word "tenant" is identically defined thus:

"tenant means the tenant of premises in respect of which a tenancy exists and includes a statutory tenant and, in the case of a sub-tenancy, a sub-tenant to whom the premises or any part thereof is sub-let."

As I have mentioned before the law applicable in the present appeal is the Control of Rent Ordinance 1956.

In section 2(1) of that Ordinance, a tenant "means the tenant of premises in respect of which a tenancy exists and, in the case of a sub-tenancy, a sub-tenant to whom the premises or any part thereof is sub-let, *and includes a statutory tenant* and the widow of a tenant who was residing with him at the time of his death, or where a tenant leaves no widow or is a woman, any member of the tenant's family over eighteen years of age so residing as aforesaid, or where there is more than one widow or member of the tenant's family over eighteen years of age so residing as aforesaid, such one of such persons as may be decided in default of agreement by the court."

The Legislature had thus enlarged scope of its protection, so that it is no longer necessarily true that a statutory tenancy would pass away with the death of the statutory tenant.

The decision in *Thong Seong Poh & Anor.* v. *Thong Meng Tee*[7] affirmed by the Federal Court [1967] 2 M.L.J. 153 referred to by the learned President is irrelevant because it revolves around the sub-letting of the tenancy by a statutory tenant.

The answer to the main issue therefore is that the family of the deceased is protected by the Ordinance, and this appeal is therefore allowed.

I feel that I should leave the question of which of the two appellants should be deemed tenant to be determined by agreement between the two and the respondents.

Appeal allowed.

Solicitors: *Joseph & Son; Syarikat Atma Singh Gill & Gill.*